NO. 48320-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DOUGNYL AKEANG,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Elizabeth Martin, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Adding a third degree theft charge in the second amended information filed after a first trial on related offenses ended in a mistrial violated CrR 4.3.1, the mandatory joinder rule.

2. Mr. Akeang was denied the effective assistance of counsel he is guaranteed under the state and federal constitutions by his trial attorney's failure to move to dismisss, on mandatory joinder ground, to the addition of a related theft charge after a first trial on related charges ended in a mistrial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1, Where the unlawful possession of a firearm, unlawful possession of a stolen vehicle and third degree theft charges arose from an incident in which the police stopped the allegedly stolen van with four occupants in it, which Mr. Akeang was driving, and found allegedly a firearm under the driver's seat and stolen bottles of liquor in the back, did the withholding of the theft of the liquor charge until after a jury was unable to reach verdicts on the weak unlawful possession charges violate CrR 4.3.1, the mandatory joinder rule?

2. Where trial counsel objected to the addition of the theft charge after a mistrial on related charges of unlawful possession of a firearm and stolen vehicle, but failed to object on mandatory joinder

grounds, was Mr. Akeang denied the effective assistance of counsel as guaranteed by the state and federal constitutions?

C. STATEMENT OF THE CASE

1. Procedural overview and the prosecutor's charging decisions

As set out in the Declaration for Determination of Probable Cause the incident which led to charges against Dougnyl Akeang in this case began with a call from a Walmart employee to the Puyallup Police reporting suspected shoplifting activity by four people. The four left the store, without taking anything, and got into a green Dodge Caravan. The van was stopped by the Puyallup Police a short time later with four people in it; Mr. Akeang was driving. A teenage girl passenger told the police that they had just stolen some liquor from a nearby Safeway. Safeway employees confirmed the store had just had a theft, and the police found bottles of liquor in the back seat of the car as well as a firearm under the driver's seat. CP 3.

Because Mr. Akeang had a prior serious felony conviction he was originally charged with unlawful possession of a firearm in the first degree. CP 1-2. When the case failed to resolve pretrial, the state amended the information to add a count of unlawful possession of a stolen

vehicle. 1RP 5[1]; CP 6-7. The trial on this amended information ended in a mistrial when the jury was unable to reach a unanimous verdict on either count. CP 27-31, 32-40, 41; 1RP 92-96, 101.

Then, over defense objection, the state filed a second amended information adding a count of third degree theft, based on the claim that liquor was stolen from Safeway, and deleting the possession of a stolen vehicle charge. 1RP 99-100; CP 43-44.

At the trial on the second amended information, the jury acquitted of the firearm charge and convicted only of the misdemeanor theft charge. CP 83-84. The court imposed a sentence of 364 days with no days suspended. CP 91-95. A timely notice of appeal followed. CP 99.

2. The prosecutor's objection to excluding evidence of the theft of alcohol from Safeway at the first trial.

The prosecutor vigorously objected, at the first trial, to the trial court's granting the defense motion in limine to exclude evidence of uncharged criminal conduct, including the theft of liquor from Safeway, arguing it was all part of the res gestae of the crimes charged. 1RP 52-60, 64, 66.

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[1] The verbatim report of proceedings is designated as follows: The proceedings from the first trial are designated 1RP. The proceedings from the retrial are in four consecutively-numbered volumes and designated RP. The sentencing hearing is designated RP(sentencing).

3. The added theft charge

When discussing prior rulings with the court at the second trial, the trial deputy prosecutor stated that the theft had been "referred" to the Puyallup municipal court. RP 5. Later, the prosecutor told the court that Mr. Akeang had not been charged with theft at the first trial because of the "concurrent jurisdiction" of "the municipal court versus the superior court." RP 42. There were no representations that he had been actually charged in municipal court, nor anything in the record to suggest he had.

4. Trial testimony at the second trial

Puyallup Police Officer Andrew Bond was on patrol on January 3, 2015. RP 31. Shortly before 1:00 a.m. he responded to a reported shoplifting incident; he was provided with a license plate number of a green Dodge Caravan. RP 32-33. Office Bond saw the van a short time later, turned to follow it and activated his emergency lights. RP 34. Dougnyl Akeang was driving the car; he pulled over and stopped on the shoulder of the road after traveling about one hundred and fifty feet. RP 34-36, 96. There were three other occupants in the van. RP 35, 96. Officer Eric Barry joined Officer Bond to assist him. RP 93-95.

Officer Bond testified that he was aware of possibly stolen merchandise – alcohol – from a nearby Safeway store; and that, when he

asked where it was, Mr. Akeang said that it was under the back seat.[2] RP 37. The occupants were arrested and the car towed to a secure police facility. RP 69-70, 101. Officer Bond obtained a search warrant for the van and recovered a firearm from under the front seat of the car and eleven bottles of alcohol from the back of the van. 72-75-76, 80, 103-104.

Officer Bond went to the Safeway store and viewed the surveillance tape which he described as having captured images of two men in the liquor aisle of the store hiding bottles under their clothing and leaving without paying. RP 74-75. Although Bond admitted on cross examination that he did not recall if the faces of the men on the tape were distinct enough to recognize, RP 89, he testified that he could recognize Mr. Akeang and the right front passenger Ranson Riklon from their clothing and physical builds. RP 75. Bond said that Akeang and Riklon had on distinctive clothes that matched. RP 75.

When the night clerk for Safeway watched the tape as it was played for the jury, he noted that one of the men was wearing a heavy winter jacket and the other had a white shirt and maybe a sweatshirt over

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[2] Because the state represented at the first trial that no statements of Mr. Akeang would be offered, 1RP 32, there had been no CrR 3.5 hearing, RP 38. Defense counsel objected at the second trial after the state elicited that Mr. Akeang had told Officer Bond where the alcohol was, and asked for a CrR 3.5 hearing. RP 38-39. The court conducted a hearing and found the statement admissible. RP 44-56 (hearing); RP 63-64 (ruling).

it. RP 157-159. The night clerk described the tape as showing two men and that it looked like they were putting liquor in their jackets. RP 159.

Officer Barry described Mr. Akeang as being nervous, shaking and moving his legs up and down during the traffic stop. RP 97.

The firearm was tested and found to be operable. RP 119-123. It was tested for fingerprints, but no useable prints were found on the weapon or the magazine for the weapon. RP 147.

Because she was in poor health, the state was allowed to read the testimony of the owner of the Dodge Caravan, Laurie Woloszyn, from the first trial to the jurors. RP 129-130. The state agreed to redact portions of the testimony relevant to the unlawful possession of a stolen vehicle charge. RP 7-8.

Ms. Woloszyn owned the Dodge Caravan. 1RP 72. She did not know Mr. Akeang, but did know Riplon and had seen him on the night of January 3, 2015 at her home. 1RP 73-74, 81-84, 88. However, Ms. Woloszyn had not given Riplon or anyone else permission to drive her van. 1RP 74. She testified that she did not own the firearm recovered from her car. 1RP 76-77.

D. ARGUMENT

1. THE ADDITION OF THE THIRD DEGREE THEFT CHARGE AFTER THE FIRST TRIAL ON RELATED OFFENSES ENDED IN A MISTRIAL VIOLATED CrR 4.3.1, THE MANDATORY JOINDER RULE.

Criminal Rule 4.3.1 mandates joinder of "related offenses" in the same charging document. CrR 4.3.1(b); State v. Lee, 132 Wn.2d 498, 501, 939 P.2d 1223 (1997). Offenses are "related" under the rule "if they are within the jurisdiction and venue of the same court and are based on the same conduct." CrR 4.3.1 (b) (1); Id. "Same conduct" is conduct involving "a single criminal incident or episode." Id. at 503. Examples of "same conduct" include:

> offenses based upon the same physical act or omission or same series of physical acts. Close temporal or geographic proximity of the offenses will often be present; however, a series of acts constituting the same criminal episode could span a period of time and involve more than one place, such as one continuous criminal episode involving a robbery, kidnapping, and assault on one victim occurring over many hours or even days.

Id. at 503-504. See, e.g. State v. Dallas, 126 Wn.2d 324, 329, 892 P.2d 1082 (1995) (theft and possession of stolen property related charges based on the same conduct); State v. Holt. 36 Wn. App. 224, 228, 673 P.2 627 (1983) (holding that the charges in two possession of pornography cases were the same conduct because the charges were the same, the kind of material allegedly illegally possessed was the same, and the date of

possession was the same).

A defendant who has been tried for one offense may move to dismiss a related offense. The motion will be granted unless the prosecution can establish either that the state was unaware of the facts establishing the offense or did not have sufficient evidence to try the charge at the time of the first trial. CRR 4.3.1(b) (3).

If a defendant has actually been charged with two or more related offenses, he or she may move to consolidate them for trial. CrR 4.3.1 (b) (2). And failure to do so constitutes a waiver of the right "to consolidation of related offenses with which the defendant knew he or she was charged." Id. But there is no waiver of the right to seek dismissal of an offense charged after a first trial because there was no opportunity to seek consolidation. CrR 4.3.1(b) (1); State v. Carter, 56 Wn. App. 217, 783 P.2d 589 (1989) (no opportunity to move to consolidate because the state added the charge after mistrial); State v. Holt, supra (the record did not show that the defendant knew about a pending charge so the failure to move to consolidate was not a waiver).

Joinder principles are designed to protect defendants from:

> "successive prosecutions based upon essentially the same conduct, whether the purpose in so doing is to hedge against the risk of an unsympathetic jury at the first trial, to place a 'hold' upon a person after he has been sentenced to imprisonment, or simply to harass by multiplicity of trials."

Lee, at 503 (quoting State v. McNeil, 20 Wn. App. 527. 532, 582 P.2d 524 (1978).[3]

The offenses charged in Lee I were "trespass and theft of rent where the defendant fixed up a house and rented it without the owner's permission," and "the conduct underlying charges in [the subsequent] case involved taking money from numerous different victims and then failing to return it when the promised housing was not provided." Id. at 504-505. Under those circumstances the court held that while the same methods of appealing to customers might have been the same, the crimes were not the same conduct. Id.

Here clearly the charges grew from the same episode – the theft of alcohol using a van which was possibly stolen and which had a firearm under the driver's seat in it when stopped by the police. The prosecutor, in fact, argued that evidence of all of the potential conduct – particularly the theft of alcohol -- should have been admissible at the first trial because the conduct was part of the res gestae of the crime. 1RP 55-57. The court excluded the evidence of the alleged theft because it was too prejudicial, finding that the need to allow relevant evidence had to be balanced against

[3] Apparently this language is from the ABA Standards Relating to Joinder and Severance 19 (Approved Draft 1968), which was first quoted in State v. Russell, 101 Wn.2d 349, 353 n.1,678 P.2d 332 (1984).

the danger that the jury would try the defendant for other misconduct than the charged crimes. RP 61, 64.

. Further, the charges against Mr. Akeang were less than sound – two juries failed to convict on the unlawful firearm charge; one acquitted. CP 41. 83-84. The unlawful possession of a stolen vehicle charge was so weak that the state did not offer it on retrial.[4] CP 43-44. It appears that the theft charge fits the description of reasons why it was not originally charged: it could have been held back as "a hedge against an unsympathetic jury at the first trial," to place a 'hold' upon a person after he has been sentenced to imprisonment, or simply to harass by multiplicity of trials. Lee, at 503.

And while the prosecutor spoke of "referring" the case to municipal court and "concurrent" jurisdiction, the state never claimed that Mr. Akeang had actually been charged in municipal court. Nor is there any evidence in the record that he was.

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[4] Defense counsel stated in court before the first trial that he had located and interviewed Riplon and Riplon said he had been the driver of the van and had picked up the others; because he believe the police might be following them and he had no license, he stopped and asked Mr. Akeang to drive. 1RP 34-35. According to defense counsel, Riplon said that Akeang had been driving less than five minutes when they were stopped by Office Banks. 1RP 35. Riplon also said in the interview that no one in the car knew about the weapon. 1RP 36. Riplon did not testify after he came to court at the first trial and invoked his Fifth Amendment privilege. RP 22.

The theft charge should have been dismissed under the mandatory joinder rule.

2. MR. AKEANG WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS TRIAL ATTORNEY'S FAILURE TO OBJECT, ON MANDATORY JOINDER GROUNDS, TO THE ADDITION OF THE THEFT CHARGE AFTER THE FIRST TRIAL ENDED IN A MISTRIAL.

Although defense counsel objected to adding the third degree theft charge after the first trial ended in a mistrial, counsel did not object on mandatory joinder grounds. 1RP 99-100. Had counsel objected on mandatory joinder grounds, as set out above, the theft charge should have been dismissed. The failure to object on proper grounds constituted deficient performance, and Mr. Akeang was obviously prejudiced by the deficient performance.

All defendants have a constitutional right to effective assistance of counsel. State v. Adams, 91 Wn.2d 86, 89-90, 586 P.2d 1168 (1978). In Strickland v. Washington, 466 U.S. 668, 687. 104 S. Ct. 2053, 80 L. Ed. 2d 674 (1984), the Supreme Court held that to make a claim of ineffective assistance of counsel under the Sixth Amendment, an appellant must show deficient performance and prejudice. Counsel's performance is deficient if it falls below "a minimum objective standard of reasonable attorney conduct." Strickland, 466 U.S. at 687. The defendant is prejudiced if

"there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Id, at 695.

Here, counsel did not object on mandatory joinder grounds; he objected generally to the addition of the theft charge and indicated he would "see if [he] could come up with some law on that." 1RP 99. Counsel should have been familiar with the Criminal Rules for Superior Court. State v. Hubert, 138 Wn. App. 924, 926, 158 P.3d 1292 (2007) ("Where counsel in a criminal case fails to advance a defense authorized by statute, and there is evidence to support the defense, counsel's performance is deficient"); Carter, 56 Wn. Ap. 224 (attorneys are presumed to know the rules of court).

More specifically, failure to be aware of CrR 4.3.1 and to move to dismiss on mandatory joinder grounds constitutes ineffective assistance of counsel. Carter, supra; Holt, supra. In such cases, there is no strategic reason for not doing so. This is particularly true in this case where counsel objected generally to adding the theft count and could have found the rule with a minimum of research.

Because Mr. Akeang was prejudiced by counsel's deficient performance – the charge was not dismissed – he was denied the effective

assistance of counsel guaranteed by the state and federal constitutions. At the least, as in Carter, the failure to move to dismiss undermines confidence in the result. Carter, at 225.

The court, in Carter, held as well that any "ends of justice" exception to dismissal under the mandatory joinder rule requires "extraordinary circumstances" not present here. Id. at 223.

The theft charge should now be dismissed.

E. CONCLUSION

Appellant respectfully submits that his third degree theft conviction should be reversed and dismissed with prejudice.

DATED this 3rd day of May, 2016.

Respectfully submitted,

_____/s/_____
RITA J. GRIFFITH
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CERTIFICATE OF SERVICE

I certify that on the 3rd of May, 2016, I caused a true and correct copy of theOpening Brief of Appellant to be served on the following by e-mail

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